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FAX MEMO

TO: Chair, Agency Release Panel
Attn: Information and Privacy Coordinator
Fax: (703) 613-3007

DATE: June 1, 2007

RE: FOIA Reference Number F-2007-01308 Freedom of Information Act Appeal Letter

PAGES TO FOLLOW: 4

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June 1, 2007

*Via Facsimile (703) 613-3007**Original by Mail*

Chair, Agency Release Panel
Attn: Information and Privacy Coordinator
Central Intelligence Agency
Washington, D.C. 20505

Re: FOIA Reference Number F-2007-01308
Freedom of Information Act Appeal Letter

Dear Chair and Information/Privacy Coordinator

This office represents the Institute for Policy Studies (IPS) in regard to IPS' May 9, 2007 Freedom of Information Act ("FOIA") request, FOIA Request F-2007-01308. Pursuant to FOIA and in accordance with 5 U.S.C. section 552(a)(6), IPS is formally appealing the May 17, 2007 response issued by the Central Intelligence Agency (CIA) and requesting that the CIA reply to this appeal within the requisite 20 day time limit. See 5 U.S.C. § 552(a)(6)(A)(ii).

On May 9, 2007, IPS submitted a FOIA request to the CIA requesting "All records related to the CIA's FOIA request #F-1999-00924, including the original FOIA request, all records released related thereto, and all other documents related to this FOIA request." IPS' May 9, 2007 FOIA request also included a request for a fee waiver.

On May 17, 2007, the CIA responded to this request by stating that IPS' request did not qualify for a fee waiver because the information sought in the request is "not likely to contribute significantly to public understanding of the operations and activities of the United States Government." Thus, the CIA determined that IPS' request fell into the "all other" fee category, which means that IPS will be assessed copying charges of ten cents per page for pages in excess of the first 100 pages and will be required to pay for agency time spent beyond the first two hours of search time.

In addition to denying IPS' request for a fee waiver, the CIA advised IPS that FOIA request F-1999-00924 is presently in litigation, and determined that the CIA was "unable to make determinations on related records until the litigation is resolved."

This office on behalf of IPS appeals the CIA's response to the May 9, 2007 FOIA request on the grounds that (1) the CIA's failure to make a determination on IPS' request constitutes a de facto withholding as neither FOIA nor FOIA's regulations exempt the CIA from searching for responsive records when the information sought is the subject of pending litigation; and (2) the CIA improperly denied IPS' request for waiver of all fees associated with this request.

First, the CIA's failure to make a determination on IPS' request constitutes a de facto withholding of records as neither FOIA nor FOIA's regulations exempt the CIA from searching for responsive records when the information sought is the subject of pending litigation. FOIA calls for broad disclosure of Government records, and "virtually every document generated by an agency is available in one form or another, unless it falls within one of the Act's nine exemptions." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (1975).

The CIA's assertion that it is unable to make a determination on IPS' FOIA request in lieu of pending litigation is not supported by any of the nine (9) FOIA exemptions. See 5 U.S.C. § 552(b)(1)-(9). As the exemptions provide the only rationale for an agency to withhold records, the agency's position that it need not search for responsive records "until the litigation is resolved" is not supported by FOIA.

Although FOIA's regulations state that "no [FOIA] *appeal* shall be accepted if the information in question. . . is the subject of pending litigation in the federal courts," the regulations provide no authority for the CIA's decision to postpone any determination on IPS' initial request until pending litigation is resolved. 32 C.F.R. §§ 1900.42(c) & 1901.42(c) [emphasis added]. While IPS is unaware, as a factual matter, that the requested information is in litigation, as a matter of law the CIA regulation itself runs afoul of the FOIA statute.

Thus, FOIA's policy, FOIA itself and FOIA's regulations provide no support for the CIA's refusal to search for documents responsive to IPS' request.

Second, the CIA improperly denied IPS' requested fee waiver. Pursuant to 5 U.S.C. section 552(a)(4)(A)(iii), disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the U.S. government and because disclosure of the requested information is not made in furtherance of any commercial interest of IPS.

(1) The Subject of the Request

The subject of IPS's request concerns FOIA request #F-1999-00924. IPS specifically submitted its FOIA request in order to determine whether or not the CIA complied with FOIA, FOIA's regulations and the CIA Information Act, 50 U.S.C. section 431, when responding to FOIA request #F-1999-00924. Thus, the subject of the requested information involves the activities and operations of the U.S. government.

(2) The Informative Value of the Information to Be Disclosed

Disclosure of this information is likely to contribute to the public's understanding of the activities of the United States with respect to the CIA's compliance with FOIA, FOIA's regulations and the CIA Information Act when processing FOIA requests. IPS believes that the requested documents are relevant and will contribute to the public's understanding of the United States government's—and, more specifically, the CIA's—compliance with FOIA. Moreover, IPS cannot obtain the requested information from any other available source, as all records related to FOIA request #F-1999-00924 are in the CIA's possession. Once the information is disseminated to the

public, the information will likely contribute to increase and add to the public's understanding of the U.S. government's compliance with FOIA. Thus, the disclosure is likely to contribute to an understanding of the U.S. government's operations and activities as they relate to FOIA, FOIA's regulations and the CIA Information Act.

(3) Contribution to General Public Understanding

Disclosure will contribute to the understanding of a broad audience beyond IPS's internal understanding. IPS, this nation's oldest progressive think-tank, submits numerous FOIA requests to the CIA and other U.S. Government agencies. IPS publishes a great deal of information on U.S. policy, much of it gleaned from agency responses to IPS' FOIA requests. IPS enriches public policy debates by publishing and making widely available reports concerning issues relating to U.S. Government transparency and public access to Government documents. Accordingly, the requested information is likely to contribute to public understanding.

(4) The Significance of the Contribution to Public Understanding

Disclosure of the requested information will elevate the public's awareness and understanding of the U.S. government's FOIA policy. As stated above, to IPS' knowledge the requested information is not available elsewhere and to IPS's knowledge has never been published for the general public. Therefore, the public's understanding of the United States' policy and the CIA's policy with respect to FOIA, the FOIA regulations and the CIA Information Act will be significantly enhanced once the information is disclosed. Thus, the disclosure of the requested information is in the public's interest and will significantly contribute to the public's understanding of the U.S. government's activities, operations and policy. In determining whether the disclosure of the requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject. *Carney v U.S. Dept. of Justice*, 19 F.3d 807 (2nd Cir. 1994).

The staff, consultants and counsel of IPS bring a broad range of expertise and skills to IPS that will enable it to review and understand the records requested through this FOIA and to then supply this information in a coherent and understandable way to the general public and the media. IPS can draw on its researchers, policy analysts, and others to review and summarize this information. IPS certainly has the necessary qualifications relevant to *any* use of the records that may come about upon reviewing them.

(5) The Existence and Magnitude of a Commercial Interest

IPS has no commercial interest that would be furthered by the requested disclosure. IPS is a 501(c)(3) tax-exempt non-profit organization and requests the information to further its scientific, legal and educational efforts.

In considering whether IPS meets the fee waiver criteria, it is imperative to remember that FOIA, in general, carries a presumption of disclosure and that the fee waiver amendments of 1986 were designed specifically to allow nonprofit, public interest groups such as IPS access to U.S. government records without the payment of fees. FOIA's fee waiver provision "is to be liberally

construed in favor of waivers for noncommercial requesters." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987). As stated by one Senator, "[A]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information. . . ." 132 Cong. Rec. S. 14298 (statement of Sen. Leahy). In interpreting this amendment, the Ninth Circuit stated that the amended statute "is to be liberally construed in favor of waivers for noncommercial requesters." (citing Sen. Leahy). The amendment's main purpose was "to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA." (citing Sen. Leahy). *McClellan*, 835 F.2d at 1284. Thus, the main legislative purpose of FOIA is to facilitate access to agency records by "watchdog" organizations, such as environmental groups, which use FOIA to monitor and challenge U.S. government activities and government policy. The FOIA fee waiver provision was added to FOIA "in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests" in clear reference to requests from nonprofit public interest groups. *Better Gov't Ass'n v. Department of State*, 780 F.2d 86, 93-94 (D.C. Cir. 1986), quoting *Ettlinger v. FBI*, 596 F. Supp. 867, 876 (D. Mass. 1984).

If the CIA does not make a determination on this FOIA appeal within 20 days, promptly conduct a thorough search for the requested records, and release the requested documents free of charge, IPS will have to consider its judicial remedies. Please contact this office if necessary.



/ Brian Gaffney //

cc: Paul Paz y Mino, Institute for Policy Studies